

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 2, 2005

IN RE:

PETITION OF KING'S CHAPEL CAPACITY, LLC
FOR A CERTIFICATE OF CONVENIENCE AND
NECESSITY TO SERVE AN AREA IN WILLIAMSON
COUNTY, TENNESSEE KNOWN AS ASHBY COMMUNITY

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DOCKET NO.
04-00335

ORDER AFFIRMING HEARING OFFICER'S ORDER ISSUED DECEMBER 17, 2004
AND HOLDING PROCEEDINGS IN ABEYANCE

This matter came before Chairman Pat Miller, Director Deborah Taylor Tate and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this Docket, at a regularly scheduled Authority Conference held on January 31, 2005 and at a Hearing held on February 3, 2005, for consideration of the *Petition of Appeal From Order of Abeyance of the Hearing Officer* ("Petition of Appeal") filed by King's Chapel Capacity, LLC ("KCC")

BACKGROUND

KCC filed a *Petition* with the TRA on October 5, 2004 for a Certificate of Public Convenience and Necessity ("CCN") to operate wastewater disposal systems to the Ashby Communities Development. Tennessee Wastewater Systems, Inc. ("TWS") filed a *Petition to Intervene of Tennessee Wastewater Systems, Inc.* ("Petition to Intervene") on October 11, 2004 stating it currently holds a CCN to serve the same area¹ and has a contract with KCC to provide wastewater services. The Authority approved TWS's *Petition to Intervene* and appointed a Hearing

¹ See *In re Petition of On-Site Systems, Inc. to Amend Its Certificate of Convenience and Necessity*, Docket No 97-01393, *Order Approving Petition of On-Site Systems, Inc. to Amend Its Certificate of Convenience and Necessity for Expansion of Service Area* (March 31, 1998) TWS was formerly known as On-Site Systems, Inc

Officer to hear preliminary matters on November 22, 2004.² On December 2, 2004, TWS filed a *Motion to Hold Proceedings in Abeyance* (“*Motion for Abeyance*”) requesting that the Hearing Officer hold KCC’s CCN proceeding in abeyance until a pending lawsuit in Williamson County Chancery Court has been resolved.³ TWS argued that, pursuant to Tenn. Code Ann. § 65-4-203(a) (2004),⁴ the Authority could not issue a certificate authorizing a new utility to compete with an existing one unless the Authority first found that the facilities of the existing system were inadequate to meet the needs of the public or that the incumbent utility refused or neglected or was unable to make such additions as needed to provide service. TWS asserted that the legal issues before the Chancery Court and those before the TRA are inextricably intertwined and that the TRA must not go forward without guidance from the Court.

In its *Motion for Abeyance*, TWS also stated that there were ongoing proceedings at the Tennessee Department of Environment and Conservation (“TDEC”) which would affect the *Petition*. Apparently, KCC had filed an application with TDEC for a state operating permit to provide service to the subdivision. TWS held a state operating permit to provide service to the subdivision, but TDEC had stated its intention to pursue termination of the permit of TWS. On December 9, 2005, KCC filed a *Response of KCC Capacity, LLC to Motion to Hold Proceedings in Abeyance* asserting that although the subdivision was within the service area for which TWS was granted a CCN, TWS neither owned nor operated any facility capable of serving the subdivision. In addition, KCC

² *Order Granting Petition to Intervene and Appointing A Hearing Officer* (January 5, 2005).

³ See *Tennessee Wastewater Systems, Inc f/k/a On-Site Systems, Inc and On-Site Capacity Development Company v J Powell Development, LLC, John Powell, Elaine Powell, C Wright Pinson, Ashby Communities, LLC, Hang Rock, LLC, Arrington Meadows, LLC, and Kings Chapel Capacity, LLC*, Case No. 31074, Verified Complaint filed in Chancery Court of Williamson County at Franklin (November 1, 2004). This action by TWS against KCC and others seeks damages, declaratory relief and injunctive relief.

⁴ Tenn. Code Ann. § 65-4-203(a) (2004) reads:

(a) The Authority shall not grant a certificate for a proposed route, plant, line, or system, or extension thereof, which will be in competition with any other route, plant, line, or system, unless it shall first determine that the facilities of the existing route, plant, line, or system are inadequate to meet the reasonable needs of the public, or the public utility operating the same refuses or neglects or is unable to or has refused or neglected, after reasonable opportunity after notice, to make such additions and extensions as may reasonably be required under the provision of this part.

asserted that although the developer paid monies to TWS to construct the wastewater system, no final agreement was reached and no contract was executed. KCC alleged that the contract submitted to the Authority and on which the Chancery Court suit relied is a forgery. Even if the contract is found not to be a forgery, KCC stated that, at best, it is a construction contract and not a provider contract as alleged by TWS. KCC asserted that Tenn. Code Ann. § 65-4-203(a) (2004) does not apply to the facts in this Docket because TWS does not own the system and has not offered any proof that it owns the system. Further, KCC argued that the determination of contract damages in the Chancery Court has no bearing on whether it was best suited to operate the wastewater system it paid to have built and currently owns. KCC urged the Authority to allow its *Petition* proceeding to move forward and not to be unreasonably delayed by an anticipated Court order based upon related, but not dependent, issues.

After considering the arguments of the parties, the Hearing Officer issued the *Order Granting Motion to Hold Proceedings in Abeyance* (“*Abeyance Order*”) on December 17, 2004. The Hearing Officer found that if Tenn. Code Ann. § 65-4-203(a) applies to this proceeding, the Authority must make a determination as to the adequacy of the existing facilities to meet the reasonable needs of the public before granting a CCN to a competitor. Such a determination, however, requires a finding of whether one of the parties is an incumbent provider and one of the parties is a competitor pursuant to the terms of that statute. Because the Authority cannot determine the respective status of the parties until the Chancery Court determines who owns the wastewater system and TDEC determines who will possess a state operating permit to provide service to the subdivision, actions by the Authority relating to the *Petition* would be premature.

For these reasons the Hearing Officer ordered the docket to be held in abeyance pending: (1) the award or refusal to award to KCC a state operating permit by TDEC and the decision by TDEC

whether or not to terminate the permit of TWS and (2) the dismissal of Count III of the Complaint⁵ or the determination of the ownership of the wastewater system by the Chancery Court in Williamson County. The parties were directed “to file with the Authority any decision by TDEC concerning the issuance or termination of the state operating permit of either party to provide service to the subdivision and any decision by the Chancery Court either dismissing Count III of the Complaint or determining the ownership of the sewer system.”⁶

On December 20, 2004, KCC filed a *Motion to Reconsider or in the Alternative Motion for Intermediate Relief* (“*Motion to Reconsider*”) requesting that the Hearing Officer reconsider the *Abeyance Order* or approve alternative relief. As grounds for its request, KCC asserted that the Authority should address the delay to forty-eight lot owners who are unable to close on their lots or begin construction until wastewater service is established and consider the cost of approximately \$25,000 per month to KCC as the result of not being able to move forward with the development. KCC characterized such delays and cost as unduly burdensome. In the alternative, KCC requested intermediate relief from the TRA through the approval of a third-party wastewater provider to finish construction and to provide wastewater services, if necessary, until the Chancery Court decides the contractual rights of TWS and KCC. During oral argument held on December 28, 2004, KCC cited, as support for its proposal, that the TRA had a duty to serve and protect the public and urged the Authority to address the equities of the situation.

On December 22, 2004, TWS filed *Response of Tennessee Wastewater to Motion to Reconsider, or in the Alternative, Motion for Intermediate Relief* (“*Reconsideration Response*”). In its *Reconsideration Response*, TWS argued that the *Motion to Reconsider* did not address the reasons stated in the *Abeyance Order* for holding the docket in abeyance and instead was based entirely on the claim that any delay resulting from the contract dispute would cause financial harm, not to KCC,

⁵ Count III of the Complaint filed by TWS in Williamson County Chancery Court asks the Court to declare TWS is the owner of the wastewater system at issue in this Docket.

⁶ *Abeyance Order*, pp. 7-8 (December 17, 2004).

but to the developer. TWS contended that the *Motion to Reconsider* does not dispute the conclusion contained in the *Abeyance Order* that the TRA cannot carry out its statutory responsibilities until the matters which are the subject of proceedings in other forums are resolved. In addition, TWS opposed the request that a third party be authorized to complete and operate the system pending a final decision by the TRA on the *Petition*. TWS asserted that any delay in the developer's project was due to the developer's refusal to abide by the contract and that TWS is capable of building and operating the system as soon as the developer fulfills its contractual obligations. TWS also asserted that until the ownership of the system is resolved, the Authority cannot determine how to apply Tenn. Code Ann. § 65-4-203(a) (2004) and cannot lawfully grant the alternative relief sought by KCC.

In acting on the *Motion to Reconsider*, the Hearing Officer considered the contentions of the delay and resulting cost to the developer and to the lot owners or potential lot owners argued by KCC. Nevertheless, the Hearing Officer found that KCC did not demonstrate how those factors affect or could alter the Authority's ability to determine the application of Tenn. Code Ann. § 65-4-203(a) (2004) to its *Petition* such that this matter could move toward a resolution. Nor did KCC demonstrate through its filings or arguments that the analysis or conclusions contained in the *Abeyance Order* were incorrect or in need of clarification. As a result, the Hearing Officer concluded that KCC's request for reconsideration of the *Abeyance Order* should be denied.⁷

Addressing KCC's request for intermediate relief in the *Motion to Reconsider*, the Hearing Officer pointed out that the TRA, as created by statute, cannot exercise powers or authority beyond those granted to it by statute. KCC did not cite to any statute that would give the Authority the power to grant equitable relief or that would authorize the TRA to act to protect the public interest in any manner other than through the exercise of its statutory powers. Nor did KCC demonstrate how the relief requested would further the public interest beyond the financial interests of the developer

⁷*Order Denying Motion to Reconsider or in the Alternative Motion for Intermediate Relief* (December 30, 2004) ("Reconsideration Order")

or lot owners. Further, KCC did not provide any authority for the TRA to appoint an interim third-party provider outside of the CCN application process as proposed in its request for intermediate relief. The Hearing Officer found that KCC failed to demonstrate that the Authority could lawfully grant the intermediate relief requested; therefore, KCC's request for intermediate relief was denied.⁸

On January 10, 2005, KCC filed a *Petition of Appeal*. Relying on Tenn. Code Ann. § 65-2-111 (2004), KCC sought de novo review by the voting panel assigned to this docket and requested oral arguments in support of its appeal. KCC stated that in previous proceedings, the Hearing Officer had failed to address its arguments that a contract between KCC and TWS did not exist and KCC was the sole owner of the property on which TWS initially began construction of a wastewater facility.

In its *Response of Tennessee Wastewater Systems In Opposition to the Petition of Appeal*, TWS argued first that Tenn. Code Ann. § 4-5-315 (1998) does not authorize KCC to bring this appeal because the Hearing Officer's *Abeyance Order* is not an "initial order" within the parameters of the statute. TWS maintained further that if the appeal is granted, the Authority should uphold the Hearing Officer's decision to hold these proceedings in abeyance.⁹

JANUARY 31, 2005 AUTHORITY CONFERENCE

At the January 31, 2005 Authority Conference, the Panel voted unanimously to hear KCC's appeal pursuant to Tenn. Comp. R. & Regs. 1220-1-2-.06(6) and waived the provision of that rule requiring an application for permission to appeal first be heard by the Hearing Officer.¹⁰ The Parties then presented oral arguments, and the panel scheduled deliberations for February 3, 2005.

⁸ See *Order Denying Motion to Reconsider or in the Alternative Motion for Intermediate Relief*, p. 8 (December 30, 2004).

⁹ See *Response of Tennessee Wastewater Systems In Opposition to the Petition of Appeal* (January 19, 2005).

¹⁰ Tenn. Comp. R. & Regs. 1220-1-2-.06(6) states:

(6) Any party who wishes to seek interlocutory review by the Authority of a Hearing Officer decision on a preliminary motion shall make application by motion to the Hearing Officer. Permission for the interlocutory review shall not be unreasonably withheld.

POSITIONS OF THE PARTIES

KCC argued that the Hearing Officer did not consider that the contract is a forgery when deciding the *Motion for Abeyance*. KCC stated it had presented two affidavits affirming that the contract between KCC and TWS is a forgery. KCC maintained TWS should not be allowed to delay the proceedings based on a meritless allegation that it has an interest in property without substantiating such a claim. Due to the delay in the proceeding, KCC has 48 lots that could not be closed because of a lack of a wastewater provider.

TWS argued that the wastewater system was substantially complete, that it built the system and that it is the only company authorized to serve the Ashby Community pursuant to a CCN issued by the Authority in Docket No. 97-01393.¹¹ TWS maintained it owns and is ready to operate the system as soon as the developer completes payment on the system. TWS noted that TDEC had placed on hold KCC's request for a state operating permit and the withdrawal of TWS's operating permit. In addition, TWS noted the record contained a letter from a Williamson County attorney recommending the Williamson County Planning Commission not proceed until the ownership of the system is determined because Williamson County requires that the same entity own and operate a wastewater system.

FEBRUARY 3, 2005 HEARING

At the February 3, 2005 hearing, the majority of the panel voted to uphold the Hearing Officer's *Abeyance Order* and affirmed the Hearing Officer's *Reconsideration Order*. Chairman Miller abstained from the vote.

Although voting to affirm the Hearing Officer's orders, the majority expressed its disagreement with the Hearing Officer's findings related to Tenn. Code Ann. § 65-4-203(a) (2004). First, the majority determined that the application of Tenn. Code Ann. § 65-4-203(a) (2004) is not

¹¹ See *In re Petition of On-Site Systems, Inc. to Amend its Certificate of Convenience and Necessity*, Docket No. 97-01393, *Order Approving On-Site Systems, Inc. to Amend its Certificate of Convenience and Necessity for Expansion of Service Area* (March 31, 1998)

dependant on the designation of an incumbent. Second, the majority found that § 65-4-203(a) (2004) does not mandate denial of the *Petition* because there is only one system at issue in this Docket. Neither entity proposed construction of a competing system or an extension of the existing incomplete system either of which is a prerequisite for reliance on Tenn. Code Ann. § 65-4-203(a) (2004)

The majority determined that the intermediate relief requested by KCC was not appropriate. Rather than rely on the inability of the Authority to provide equitable relief, as did the Hearing Officer, the majority found that KCC would not benefit from the granting of the intermediate relief because a third-party provider must obtain a TDEC permit, a requirement that is not likely to be fulfilled given the treatment of KCC's application before TDEC and TDEC's suspension of TWS's permit.

The majority further stated that it is not "administratively efficient" to proceed with KCC's *Petition* at this time. It noted that, while a TDEC state operating permit is not necessary for the TRA to determine whether to grant a CCN, KCC is unable to operate a wastewater system until it has obtained a state operating permit and such approval is not forthcoming until other issues with TDEC are resolved. The majority also found that there are many factual disputes that should be resolved by the Williamson County Chancery Court and the existence of the disputes renders consideration of the public interest prong of the CCN analysis difficult, if not impossible.

IT IS THEREFORE ORDERED THAT:

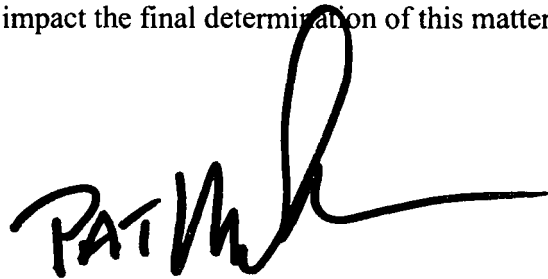
1. The Hearing Officer's decision on the *Motion to Hold Proceedings in Abeyance* is upheld.
2. The Hearing Officer's decision on the *Motion to Reconsider or in the Alternative Motion for Intermediate Relief* is upheld.
3. Consistent with the Hearing Officer's *Order Granting Motion to Hold Proceedings in Abeyance* issued on December 17, 2004, the proceedings in this Docket shall be held in abeyance

pending: (1) a decision by TDEC either to award or refuse to award KCC a state operating permit and either to terminate or not to terminate the permit of TWS issued by TDEC and (2) the dismissal of Count III of the Complaint or the determination of ownership of the wastewater system by the Chancery Court in Williamson County.¹²

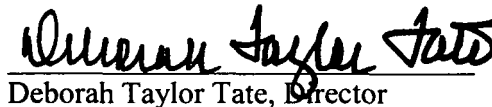
4 The Parties shall file with the Authority any written decision or other filing evidencing:

a) a decision by the Chancery Court in Williamson County, Tennessee dismissing Count III of the Complaint or determining the ownership of the wastewater system in question; or

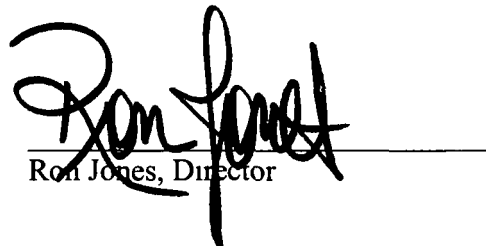
b) a decision by another entity that would impact the final determination of this matter by the Authority

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Pat Miller, Chairman

A handwritten signature in black ink, appearing to read "Deborah Taylor Tate", with a horizontal line underneath.

Deborah Taylor Tate, Director

A handwritten signature in black ink, appearing to read "Ron Jones", with a horizontal line underneath.

Ron Jones, Director

¹² Count III of the Complaint filed by TWS in Williamson County Chancery Court asks the Court to declare TWS is the owner of the wastewater system at issue in this Docket